

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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WASHINGTON, D.C.

APR 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Amendment of Part 74 of the Commission's
Rules with Regard to the Instructional
Television Fixed Service

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MM Docket No. 93-24

To: The Commission

JOINT COMMENTS OF EDUCATIONAL PARTIES

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SUMMARY

These Joint Comments are filed on behalf of leading higher education associations, public and private universities, state agencies, and public television and ITFS licensees, including the nation's largest ITFS operators. They conclude that the FCC should adopt the proposed window filing procedure for ITFS only if the procedure incorporates refinements critical to the preservation and enhancement of the ITFS service.

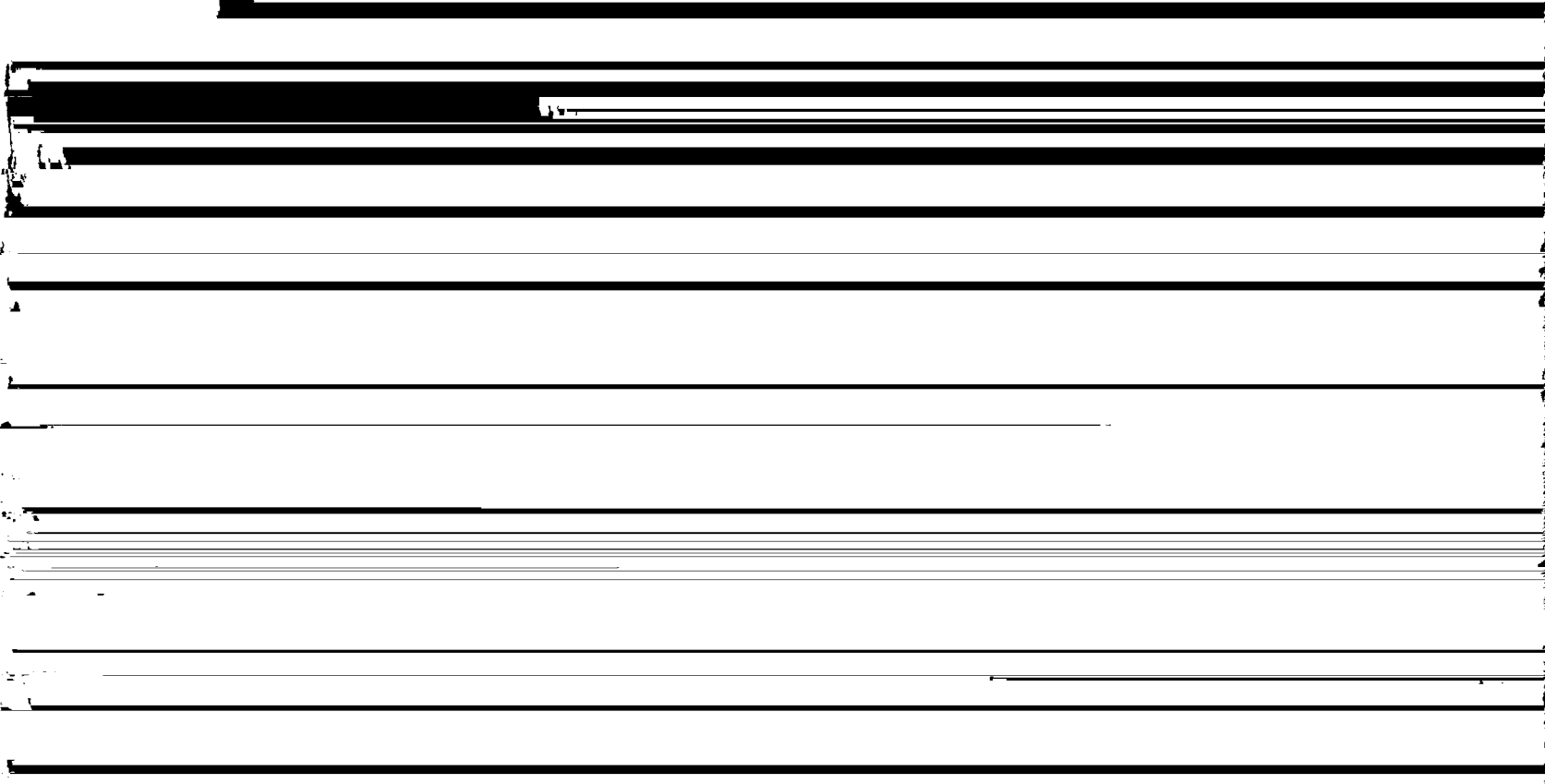
There are only two possible legitimate advantages to the use of a window procedure -- the elimination of copy-cat applications filed in response to A cutoff lists and the reduction to some extent of duplication of processing that now characterizes the A/B cutoff approach. These advantages must be weighed against the disadvantages -- the prospect that educators will find themselves precluded by virtue of a window filing of which they had no notice, the resulting incentive for potential applicants to file a landslide of applications in the early windows, and, most importantly, the potential for the procedure to deny reasonable flexibility to educators seeking to file ITFS applications to respond on a timely basis to developing educational needs.

In order for any window filing procedure for ITFS to serve the public interest, the procedure must include these five refinements:

1. A fixed schedule of windows -- a minimum of two each year in early January and early July -- for new ITFS applications and major changes;

2. Exemption of major changes from the window procedure or, at least, additional fixed windows -- probably in April and October of each year -- for major changes;
3. Additional windows on an ad hoc basis when funding agencies establish filing deadlines that are not accommodated by the fixed windows;
4. Provisions for educators to have notice of and an opportunity to file competing applications against commercial applications for ITFS channels, thus preserving the careful balance of interests crafted in MM Docket No. 90-54; and
5. Limits on the number of applications for new ITFS stations (between 3 and 5) that can be filed by non-local entities in any given window.

In addition, the Educational Parties urge the FCC to devote adequate resources to ITFS processing and to resolve these issues and lift the current freeze as quickly as



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JOINT COMMENTS OF EDUCATIONAL PARTIES

American Council on Education, American Association of Community
Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association
for Higher Education, California State University - Sacramento, Iowa Public
Broadcasting Board, South Carolina Educational Television Commission, State of
Wisconsin - Educational Communications Board, St. Louis Regional Educational and
Public Television Commission, University of Maine System, University of Wisconsin
System, and University System of the Ana G. Mendez Educational Foundation,
("Educational Parties"), by their attorneys, provide these joint comments in response to
the Notice of Proposed Rule Making in MM Docket No. 93-24, FCC 93-90 (released
February 25, 1993), relating to the procedural rules governing the Instructional
Television Fixed Service.

I. Educational Parties.

The Educational Parties are leading higher educational associations, public and private universities, state agencies and public television and ITFS operators throughout the United States and Puerto Rico. They come together to comment in this proceeding with one goal in mind -- to encourage the FCC to adopt procedural rules for ITFS that will promote efficiency while enhancing the prospects of the use of the ITFS service for its primary educational function. The Educational Parties are as follows:

The American Council on Education. ACE, founded in 1918, is one of the nation's premier higher education organizations. Its members include more than 1,500 colleges and universities, both public and private, as well as other higher education groups. ACE aims to promote and preserve the goals of higher education, including the interests of its constituent institutions, their students, faculty and administrators.

American Association of Community Colleges. AACC represents more than 1,200 community colleges throughout the United States and seeks to serve the public interest by providing student access to excellent higher education programs, including those programs delivered by telecommunications technologies.

Arizona Board of Regents for Benefit of the University of Arizona. The University of Arizona is a long-time player in public broadcasting and educational telecommunications. UA operates 16 ITFS and three OFS channels in Tucson, as well as public TV, public radio, TV and FM translators and satellite facilities.

California State University - Sacramento. CSU-Sacramento is part of the largest undergraduate teaching university in the United States and a significant user of distance learning technology, including ITFS, satellite and compressed video.

Alliance for Higher Education. AHE is a consortium of 21 north Texas area colleges and universities operating ITFS and microwave facilities in the Dallas/Forth Worth area. AHE's instructional television service is part of a comprehensive interactive system which connects AHE member institutions to each other and to major corporations, hospitals and medical centers.

Iowa Public Broadcasting Board. IPBB is an agency of the State of Iowa charged with the coordination of educational telecommunications activities within the state. In addition to operating an eight-station public TV network and a number of ITFS facilities, IPBB is overseeing the state's construction of a \$200 million fiber optic backbone system linking educational and governmental users around the state.

State of Wisconsin - Educational Communications Board. ECB is an agency of the State of Wisconsin overseeing educational telecommunications activities within the state. ECB operates the Wisconsin Public Television and Wisconsin Public Radio networks, as well as a number of ITFS facilities.

St. Louis Regional Educational and Public Television Commission. The Commission is licensee of noncommercial educational television Station KETC. Channel

member of the Hispanic Educational Satellite Service ("HESS") and a strong proponent of distance learning.

II. FCC Proposal.

In the NPRM, the FCC proposes to abandon the traditional A/B cutoff procedure for ITFS and institute instead a window filing procedure.^{1/} Under the proposed window procedure, applications for new ITFS stations and for major changes could only be filed during windows that would be announced about 60 days in advance. At the close of a window, all acceptable applications on file would be cutoff from later-filed competing applications. The FCC would put the applications on a public notice inviting petitions to deny, but not competing applications.

If two or more competing applications were filed in the same window, the FCC would apply the regular comparative point procedure to determine who prevails. If an application filed during a window was not mutually exclusive with any other application filed in the window, it would be grantable without having to face the prospect of competing applications.

^{1/} The FCC also imposes a freeze on the acceptance of new ITFS applications and major changes, in order to prevent a landslide of ITFS applications while it considers a change in procedures. This action results in a significant burden on educators seeking to enhance or expand their offerings and, as such, disserves the public interest. The Commission should move forward to resolve the issues in this proceeding and to lift the freeze at the earliest possible time.

The FCC's proposal is based on what it describes as a significant increase in the number of ITFS applications filed over the past two years and the resulting burden on its capacity to "expeditiously and effectively authorize new service." The FCC seeks to allow its staff to better control the flow of applications, as well as to achieve processing efficiencies.

Generally, the Educational Parties recognize that a window filing procedure can achieve some minor processing efficiencies and can eliminate copy-cat filings. However, the procedure can also operate to artificially slow the pace of legitimate filings and deprive educators of crucial flexibility in implementing their instructional telecommunications plans. The Educational Parties conclude that, on balance, the procedure can be justified only if appropriate safeguards are incorporated to prevent strangulation of the ITFS service. Moreover, the FCC's objectives here can be achieved only if it is willing to devote resources to ITFS processing commensurate with the importance of the task. These issues are discussed in more detail below.

III. Possible Advantages of a Window Procedure.

It appears that a window filing procedure could deter speculative filings and increase processing efficiencies for ITFS applications. The goal of this proceeding should be to seize these advantages while minimizing the disadvantages of the procedure.

On the plus side, there is no doubt that a window procedure can eliminate copy-cat applications that are filed in response to A cutoff lists by educational entities that are the unwitting pawns of wireless cable speculators and extortionists. It is all too

easy now for unscrupulous commercial operators to review applications listed in cutoff notices, to determine where such applications result from the efforts of legitimate prospective wireless cable operators to assist educators whose excess capacity can be leased, and to file competing applications on behalf of other educators who are promised a painless method of garnering lease fees and obtaining programming availabilities. For a relative modest investment, these operators can speculate on the commercial prospects identified by others or extort payoffs from legitimate operators who are anxious to proceed with their plans. By eliminating the ability of parties to review other parties' filings prior to cutoff, this practice can be significantly curtailed.

The window filing procedure can also reduce to some degree the processing requirements for ITFS applications. The NPRM, at paragraph 5, describes that some processing (largely technical to ensure that the application is not mutually exclusive with other applications or precluded by existing authorizations) takes place prior to issuance of an A cutoff list, and that further post-cutoff processing is necessary (additional technical plus legal analysis). Although the Educational Parties believe that the FCC's characterization of this process as "time-consuming double processing" is largely overstated, it is probable that some duplicative processing takes place, especially in technical areas, and that this duplication can be reduced to some degree by a window procedure.^{2/} This factor would probably not, in itself, justify a radical change in

^{2/} Even in a window procedure, some initial technical processing will be necessary to determine mutual exclusivity prior to the issuance of a proposed grant list and to final technical and legal processing.

procedures, especially in view of the disadvantages of the proposal as described below. However, combined with the reduction in speculative and extortive filings described above, there is a reasoned basis for the consideration of the window procedure.

IV. Disadvantages of Window Procedure.

There are substantial disadvantages to the proposed window filing procedure. One unavoidable problem is the flip-side of eliminating copy-cat filings -- the procedure results in local educators losing their opportunity to file for ITFS channels without ever having had notice of specific interest in the channels by others. Under the current A/B cutoff approach, no potential applicant can be precluded without having an opportunity to file after finding out that others have applied for available frequencies. This notice is provided by the issuance of an A cutoff list. Under the window approach, an educator engaged in planning for the use of educational telecommunications via ITFS, but not yet planning to file, could find itself unexpectedly precluded following the close of a window. This is a significant potential problem for educators, despite the suggestions in the NPRM to the contrary.^{3/}

^{3/} In the past, as reflected in the NPRM at paragraph 7, the FCC has noted the difficulties that would be faced by educational institutions under an ITFS window approach due to their lack of in-house staff and expertise in FCC applications, the restraints of budgetary processes and the need for long-term programmatic and facilities planning. See also, Second Report and Order in MM Docket No. 83-523, 101 FCC2d 49 (1985), at paragraph 56. The FCC now discounts these problems, but cites only the purported fast-response capabilities of ITFS applicants backed by wireless cable operators. The Educational Parties submit that the FCC should not lose sight of the need of other ITFS applicants, often funded by grants and legislative appropriations, who do not intend to lease excess capacity but instead seek to operate their stations wholly for the service's primary purpose: education.

There is a second disadvantage to a window approach that flows directly from the first. In view of the risk that, in any given window, the channels being planned for by a prospective applicant will be applied for unexpectedly by someone else, educators will rationally respond by filing applications just to protect their future plans. The result could be a landslide of applications in the early windows -- especially the first one -- by applicants who are not truly ready to construct and operate. Thus, in one brilliant stroke, the Commission will have exacerbated the very problem it sought to ameliorate.^{4/}

By far the biggest problem, however, and the one that gives the Educational Parties extreme concern, is that the window procedure could be administered by the staff in a manner that denies reasonable flexibility to educational entities seeking to respond on a timely basis to developing educational needs. This would happen if the staff delays the opening of windows so as merely to slow the flow of

4/ This problem could to some degree be reduced by placing a cap on the number of applications for new stations that can be filed in any given window by any given party. In the LPTV service, the Commission has adopted a cap of five applications for this very reason. Unfortunately, a cap will not address speculative filings by numerous parties

applications to a "manageable" trickle. The Commission should make no mistake about it: a procedure allowing new and major changes only once or twice a year, or perhaps even less often than that, would virtually strangle the further development of both ITFS and wireless cable.

The Educational Parties are extraordinarily disturbed that the NPRM hints that the window procedure would be used in exactly this manner. At paragraph 7, the NPRM states that "use of a filing window will allow the staff to control [read slow down] the flow of applications ..." This suggests that the staff may intend to open windows infrequently (for example, only when all applications previously on file, regardless of merit or pressing need, have been processed to conclusion).

The NPRM, at paragraph 6 and n. 8, specifically refers to the LPTV service's window procedure as a model to be followed in the ITFS service. Our research, however, shows that the LPTV Branch has done exactly what the Educational Parties fear most -- obstructed the reasonable flow of LPTV filings by opening windows on the average of 14 months apart. The window procedure for LPTV was adopted effective December 26, 1984 by the Report and Order in MM Docket No. 83-1350, 102 FCC2d 929 (1984). In the ensuing nine years and four months, the FCC has opened only eight windows, one of which only applied to applications in Alaska.^{5/} If only the seven general application windows are considered, the average time between windows has been

^{5/} The windows were June 3-17, 1985 (Alaska only); June 22-July 2, 1987; June 15-24, 1988; March 6-10, 1989; December 4-8, 1989; April 23-May 3, 1991; February 10-14, 1992; and March 29-April 2, 1993.

16 months. Indeed, the first general window was not opened for two and one-half years after the adoption of the window procedure. This process -- no doubt tidy and convenient for the LPTV Branch -- has helped to ensure that the LPTV service is in the moribund state that it is today.^{6/} The FCC simply cannot allow this same process to take place in ITFS. Windows opened 14 or 16 months apart would decimate the development of ITFS and wireless cable, to the ultimate detriment of the public the FCC is sworn to serve.

V. Any Window Filing Procedure Must Be Structured to Minimize the Disadvantages of the Process.

Clearly, the public interest will not be served by a window filing procedure for ITFS unless the FCC builds in a number of protections to minimize the problems noted above. The Educational Parties support the window procedure only if the following five refinements are incorporated:

A. Fixed Schedule of Windows for All Applications. The FCC's rules should specify a minimum yearly schedule of application windows for new stations and

falls in mid-January, and one mid-year, probably in early July. This schedule would accommodate PTFP-related ITFS applications and provide another filing opportunity six months later. A fixed schedule would permit applicants to plan their filings in advance of the 60-day announcement of the window and would provide a minimum level of flexibility as Educational Parties and wireless cable operators develop their plans. Such a schedule would go a long way to ensure that the LPTV fiasco does not develop in the ITFS service.

B. Exemption or Additional Fixed Windows for Major Changes.

Existing ITFS licensees can attest to the need for flexibility in processing major change applications, which are often submitted to resolve coverage deficiencies or other problems discovered only after an ITFS station takes to the air. It is frequently necessary to add channels to a station previously operating with fewer channels than a full four channel group, to increase power, or to move a station more than ten miles^{7/} in order to satisfy educational needs. The Educational Parties propose that the FCC exempt major changes altogether from the window procedure. Alternatively, the FCC should establish at least two additional yearly fixed windows --in April and October -- during which major changes can be filed. Major change applications represent only a minuscule number of ITFS applications being filed and do not materially contribute to

^{7/} Section 74.911(a)(1) of the rules, which defines ITFS major changes, does not include station moves greater than ten miles. The staff has created an informal policy classifying such changes as major.

the increased application flow.^{8/} The greater need for processing flexibility is obvious in order to preserve, expand and enhance existing educational service. An exemption from the window procedure is appropriate. If no exemption is adopted, additional windows for major changes are amply justified.

C. Additional Windows on an Ad Hoc Basis. The FCC should also require the staff to open additional windows for new applications on an ad hoc basis when governmental funding agencies establish deadlines (other than the mid-January PTFP deadline) that may necessitate new ITFS filings. This does not happen often, but additional windows may be necessary from time to time. For example, this year, NTIA will likely hold a second PTFP grant round for non-broadcast educational applications in response to the Administration's proposal to make an additional appropriation of \$64 million to the PTFP to fund facilities to link schools, colleges, universities, libraries, learning centers and businesses. NTIA is expected to publish grant guidelines in the Federal Register by the end of April and is expected to require applications to be filed between June 15 and July 15, 1993. Depending on the actual application deadline, a filing opportunity other than a fixed window will be necessary to permit ITFS applicants to compete for these funds. In situations such as this, the FCC must provide for additional filing windows.

^{8/} For example, an analysis of the 11 most recent cutoff lists (specifying cutoff dates in 1992 and 1993) shows that of the 796 applications listed, only 38, less than 5%, were for major changes as opposed to new stations. See ITFS Cutoff Lists A26-A30, B11-B14 and C1-C2.

D. Opportunities for Educators to Learn of and Over-File Commercial Entities. In the Second Report and Order in Gen. Docket No. 90-54, 6 FCC Rcd. 6792 (1991), the FCC adopted rules permitting commercial entities to file for vacant ITFS channels in certain circumstances. A critical component of this highly contentious procedure, enacted to protect the essential educational purpose of the ITFS service, provided educators with notice of such filings and an opportunity to file mutually exclusive ITFS applications that would have absolute priority over the commercial proposals. These protections must be retained under any window filing procedure. The Educational Parties expect that ITFS applications by commercial entities would have to be filed in windows like any other ITFS application. Then, with respect to these commercial applications only, an "A" cutoff list or other appropriate notice would have to be issued that provides at least 60 days for educators to file competing applications as currently permitted under the procedure adopted in the Second Report and Order. Any other procedure would undermine the carefully crafted compromise established in that Docket.

E. Limits on Applications by Non-Local Entities. As noted earlier, the prospect of land rush filings, especially in early windows, suggests the need for a cap on the number of applications to be filed by certain entities (and those in privity with the entities) in any given window. At the same time, the legitimate need of local educators (especially statewide or regional agencies) to file multiple applications to serve large regions within their jurisdictions must be protected. Thus the Educational Parties

suggest that a cap of between three and five applications be instituted for nonlocal entities in any given window. Given the intense local coordination needed to explore necessary working relationships with local educators, establish local programming committees and develop programming proposals, such a cap should not constitute an undue burden on any bona fide nonlocal applicant. Indeed, the cap could contribute to better developed and more locally responsive proposals by such entities.

VI. The Commission Must Devote Adequate Resources to ITFS Processing.

Ultimately, a window filing procedure will likely result in only marginal relief for the Commission in processing ITFS applications. The burden can only be overcome by the FCC's resolve to devote increased resources to the Distribution Services Branch to assist its heretofore valiant efforts to authorize new or modified ITFS service. There is little doubt that educational technologies such as ITFS can contribute significantly to our nation's pressing need for enhanced educational opportunities. Educational telecommunications offers the capability to improve equities between rural, suburban and urban areas, to increase educational resources in all areas, and to contribute to productivity through worker training. These are important goals and they deserve the Commission's support.

VII. The Commission Must Resolve These Issues Expediently.

As a result of the freeze pending resolution of the procedural issues, many ITFS filings have been blocked. This harms both educational endeavors and the initiation of wireless cable competition to traditional cable television. It also generates

numerous STA requests which, if considered, will result in inefficient double processing of ITFS applications. For all these reasons, the Commission should move quickly to resolve these issues and lift the freeze.

Conclusion

The FCC should institute a window filing procedure only if it adopts the refinements noted above. Otherwise, it should retain the current A/B cutoff approach. In any event, the Commission must devote adequate resources to processing ITFS applications.

Respectfully submitted,

AMERICAN COUNCIL ON EDUCATION

**AMERICAN ASSOCIATION OF
COMMUNITY COLLEGES**

**ARIZONA BOARD OF REGENTS FOR
BENEFIT OF THE UNIVERSITY OF
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UNIVERSITY OF WISCONSIN SYSTEM

**UNIVERSITY SYSTEM OF THE ANA G.
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